No. 19-8561

IN THE SUPREME COURT OF THE UNITED STATES

JESUS JULIAN CORONA-PEREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether plain-error relief is warranted on petitioner's claim that Almendarez-Torres v. United States, 523 U.S. 224 (1998), should be overruled.

2. Whether the district court erred in classifying petitioner's prior conviction for robbery, in violation of Tex. Penal Code Ann. § 29.02 (West 2005), as a "crime of violence" within the meaning of former Sentencing Guidelines § 2L1.2(b)(1)(A)(ii) (2015).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States v. Corona-Perez, No. 17-cr-392 (July 12, 2018)

United States Court of Appeals (5th Cir.):

United States v. Corona-Perez, No. 18-10933 (Dec. 27, 2019)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is not published in the Federal Reporter but is reprinted at 788 Fed. Appx. 965.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 2019. The petition for a writ of certiorari was filed on May 26, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Texas, petitioner was convicted on one count of illegal reentry after removal, in violation of 8 U.S.C. 1326(a) and (b)(1). Pet. App. B1. The district court sentenced him to 70 months of imprisonment. Id. at B2. The court of appeals affirmed. Pet. App. A1-A2.

1. Petitioner illegally entered the United States in 1990. Presentence Investigation Report (PSR) ¶ 12. After he was convicted of multiple crimes in Texas state court in 2003, he was removed to Mexico the following year. PSR ¶ 13. Petitioner illegally reentered the United States in 2004. PSR ¶¶ 14-15. After he was convicted of multiple crimes, including robbery, in Texas state court in 2005, he was again removed to Mexico. Ibid. Petitioner illegally reentered the United States again in 2010, and he pleaded guilty in federal court to one count of illegal reentry after removal, in violation of 8 U.S.C. 1326. PSR ¶ 16. In 2014, he was again removed to Mexico. Ibid.

Petitioner then reentered the United States yet again, where he was convicted of multiple crimes in Texas state court in 2016. PSR ¶¶ 1, 9. In 2017, a grand jury indicted petitioner on one count of illegal reentry after removal, in violation of 8 U.S.C. 1326. Indictment 1-2. He pleaded guilty to the charge. PSR ¶ 5.

2. The Probation Office's presentence report initially applied the 2015 Sentencing Guidelines and determined that petitioner's 2005 conviction for robbery in violation of Tex. Penal Code Ann. § 29.02 (West 2005) qualified as a "crime of violence" and triggered a 16-level increase under Sentencing Guidelines § 2L1.2(b)(1)(A)(ii). PSR ¶ 24. The application notes to that version of Section 2L1.2 defined "crime of violence" as either (i) one of several listed "offenses under federal, state, or local law" -- including "robbery" -- or (ii) "any other offense * * * that has as an element the use, attempted use, or threatened use of physical force against the person of another." Sentencing Guidelines § 2L1.2, comment. (n.1(B)(iii)) (2015).

After reviewing the parties' objections to the presentence report, the Probation Office determined that it should have applied the 2016 version, rather than the 2015 version, of the Guidelines, because the 2016 version was "more beneficial" to petitioner. PSR Second Addendum 1-2. Specifically, Section 2L1.2 of the 2016 Guidelines did not include an enhancement for a prior "crime of violence" conviction, and instead included enhancements that varied depending on the sentences actually imposed for prior felony or misdemeanor convictions. Sentencing Guidelines § 2L1.2(b)(2) (2016). Under the relevant provision of the 2016 Guidelines, petitioner's robbery conviction resulted in a 10-level increase rather than a 16-level increase, resulting in an overall advisory

Guidelines range of 63 to 78 months. PSR Second Addendum ¶¶ 24a, 101. The Probation Office noted, however, that if his Texas robbery conviction did not qualify as a "crime of violence" under the 2015 Guidelines, then application of the 2015 Guidelines would result in a lower overall advisory Guidelines range of 33 to 41 months. Id. at 2.

At sentencing, petitioner contended that his Texas robbery conviction did not qualify as a "crime of violence" and that the district court should therefore apply the 2015 Guidelines. Sent. Tr. 11-14. The district court overruled that objection, explaining that "the Texas robbery conviction qualifies as an enumerated crime of violence" under United States v. Santiesteban-Hernandez, 469 F.3d 376 (5th Cir. 2006), abrogated on other grounds by United States v. Rodriguez, 711 F.3d 541 (5th Cir.), cert. denied, 571 U.S. 989 (2013). Sent. Tr. 15. The court then sentenced petitioner to 70 months of imprisonment. Id. at 20. In doing so, it made clear that, in light of petitioner's overall criminal history, it would have imposed that sentence "no matter where we had landed on the guidelines issue." Ibid.

3. Petitioner appealed, raising two issues that he acknowledged were foreclosed by binding precedent. First, he renewed his argument that Texas robbery is not a "crime of violence" under Section 2L1.2(b)(1)(A)(ii) of the 2015 Sentencing Guidelines. Pet. C.A. Br. 8-15. Petitioner acknowledged, however,

that his argument was foreclosed both by Santiesteban-Hernandez, which held that the elements of Texas robbery substantially correspond to the elements of generic robbery as listed under the Guidelines, and by United States v. Burris, 920 F.3d 942 (5th Cir. 2019), petition for cert. pending, No. 19-6186 (filed Oct. 3, 2019), which determined that Texas robbery has as an element the attempted or threatened use of physical force. Pet. C.A. Br. 8-15. Second, he argued for the first time that the district court erred by imposing a term of imprisonment in excess of two years, on the theory that it should have regarded "the prior felony provision of 8 U.S.C. § 1326(b)(1) [as] an essential offense element." Pet. C.A. Br. 16; see 8 U.S.C. 1326(a) and (b)(1) (setting a two-year statutory maximum generally, but a ten-year statutory maximum if the defendant's prior removal occurred subsequent to the commission of a felony).

The court of appeals granted the government's motion for summary affirmance. Pet. App. A2. The court explained that petitioner's argument regarding Texas robbery was foreclosed by its decisions in Santiesteban-Hernandez and Burris, and that his contention that the prior felony provision of 8 U.S.C. 1326(b)(1) should be treated as an essential element of the offense was foreclosed by this Court's decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998). Pet. App. A1-A2.

ARGUMENT

Petitioner contends (Pet. 8-13) that this Court should overrule Almendarez-Torres v. United States, 523 U.S. 224 (1998). He also contends (Pet. 13-14) that the district court erred in determining that his Texas offense was a "crime of violence" for purposes of applying a 16-level enhancement under Sentencing Guidelines § 2L1.2(b)(1)(A)(ii) (2015). Neither contention warrants further review, and, in any event, this case presents a poor vehicle for addressing either issue.

1. Petitioner first contends (Pet. 8-13) that this Court should overrule Almendarez-Torres, which held that a defendant's prior conviction is a sentencing factor, rather than an element, of an enhanced illegal-reentry offense under 8 U.S.C. 1326(b) and need not be proved to a jury beyond a reasonable doubt. 523 U.S. at 228-239. As the government recently explained in its briefs in opposition in Castro-Lopez v. United States, No. 19-5829 (Dec. 2, 2019), Castaneda-Torres v. United States, No. 19-5907 (Dec. 30, 2019), and Sauste Balderas v. United States, No. 19-5865 (Jan. 2, 2020) -- copies of which have been served on petitioner -- the question whether to overrule Almendarez-Torres does not warrant this Court's review. This Court has recently and repeatedly denied

review of similar issues in other cases.* It should follow the same course here.

Indeed, even if the issue would otherwise warrant this Court's review, this case would be a poor vehicle for considering it because petitioner's challenge may be reviewed only for plain error. As petitioner acknowledges (Pet. 12), he did not raise this issue before the district court, and his claim is therefore reviewable only for plain error, see Fed. R. Crim. P. 52(b); United States v. Olano, 507 U.S. 725, 731-732 (1993). To establish reversible plain error, petitioner must demonstrate (1) error; (2) that is plain or obvious; (3) that affected substantial rights; and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings. Olano, 507 U.S. at 732-736;

* See, e.g., Mitchell v. United States, No. 19-6800 (Apr. 6, 2020); Martinez-Mendoza v. United States, 140 S. Ct. 1137 (2020); Pineda-Castellanos v. United States, 140 S. Ct. 1135 (2020); Ramirez v. United States, 140 S. Ct. 1134 (2020); Arias-De Jesus v. United States, 140 S. Ct. 1132 (2020); Castaneda-Torres v. United States, 140 S. Ct. 1131 (2020); Gonzalez-Terrazas v. United States, 140 S. Ct. 1130 (2020); Enriquez-Hernandez v. United States, 140 S. Ct. 1130 (2020); Sauste Balderas v. United States, 140 S. Ct. 1130 (2020); Castro-Lopez v. United States, 140 S. Ct. 1130 (2020); Herrera-Segovia v. United States, 140 S. Ct. 961 (2020); Rios-Garza v. United States, 140 S. Ct. 278 (2019); Collazo-Gonzalez v. United States, 140 S. Ct. 273 (2019); Phillips v. United States, 140 S. Ct. 270 (2019); Esparza-Salazar v. United States, 140 S. Ct. 264 (2019); Capistran v. United States, 140 S. Ct. 237 (2019); Riojas-Ordaz v. United States, 140 S. Ct. 120 (2019); Dolmo-Alvarez v. United States, 140 S. Ct. 74 (2019); Betancourt-Carrillo v. United States, 140 S. Ct. 59 (2019).

see, e.g., Puckett v. United States, 556 U.S. 129, 135 (2009). He cannot do so.

In Apprendi v. New Jersey, 530 U.S. 466 (2000), this Court held that the Sixth Amendment requires any fact "[o]ther than the fact of a prior conviction" to be submitted to a jury and proved beyond a reasonable doubt (or admitted by the defendant) when it increases the penalty for a crime above the otherwise prescribed statutory maximum. Id. at 490. This Court has repeatedly reiterated that the Sixth Amendment rule announced in Apprendi applies only to penalty-enhancing facts other than the fact of a prior conviction. See, e.g., Descamps v. United States, 570 U.S. 254, 269 (2013); Alleyne v. United States, 570 U.S. 99, 111 n.1 (2013); Southern Union Co. v. United States, 567 U.S. 343, 346 (2012); Carachuri-Rosendo v. Holder, 560 U.S. 563, 567 n.3 (2010); Cunningham v. California, 549 U.S. 270, 274-275 (2007); United States v. Booker, 543 U.S. 220, 244 (2005).

In light of those decisions, petitioner cannot demonstrate that the court of appeals' adherence to Almendarez-Torres was error, much less a "clear or obvious" error. Puckett, 556 U.S. at 135. To satisfy the second prong of plain-error review, a defendant must show that an error was so obvious under the law as it existed at the time of the relevant district court or appellate proceedings that the courts "were derelict in countenancing it, even absent the defendant's timely assistance in detecting it."

United States v. Frady, 456 U.S. 152, 163 (1982). And the uncontested existence and nature of petitioner's prior conviction would independently preclude a showing of prejudice under the third prong or the sort of injustice necessary to satisfy the fourth prong. The courts below did not plainly err in following this Court's precedent.

2. Petitioner next contends (Pet. 13-14) that this Court should grant review to consider whether the district court erroneously determined that his prior Texas robbery offense qualified as a "crime of violence" for purposes of applying the 16-level enhancement of his offense level under Sentencing Guidelines § 2L1.2(b)(1)(A)(ii) (2015). He does not, however, provide any explanation of why he believes that the court of appeals' resolution of that issue is incorrect. Nor does he articulate why review of this particular application of the Guidelines is warranted, especially when the provision at issue has been superseded and the district court made clear that it would have imposed the same sentence even if the "crime of violence" enhancement did not apply. See Braxton v. United States, 500 U.S. 344, 347-349 (1991); Sentencing Guidelines App. C, Amend. 802 (Nov. 1, 2016) (amending Guidelines to eliminate the Section 2L1.2(b)(1)(A)(ii) enhancement); Sent. Tr. 20-21.

Instead, petitioner asks this Court to hold his petition for a writ of certiorari pending this Court's resolution of Borden v.

United States, cert. granted, No. 19-5410 (oral argument scheduled for Nov. 3, 2020), and Burris v. United States, No. 19-6186 (filed Oct. 3, 2019), which present the question whether a crime committed with the mens rea of recklessness can involve the "use of physical force" under the elements clause of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(i), see Pet. at i, Borden, supra; Pet. at i, Burris, supra. But even if this Court were to hold in Borden that such a crime does not involve the "use of physical force," and then grant, vacate, and remand in Burris, that would not entitle petitioner to any relief. That is because the court of appeals, in addition to relying on its prior decision in United States v. Burris, 920 F.3d 942 (2019), recognized that petitioner's contention was independently foreclosed by Santiesteban-Hernandez, which determined that Texas robbery qualified as a "robbery" for purposes of former Section 2L1.2's list of offenses that automatically qualify as a "crime of violence." See 469 F.3d at 381; Pet. App. A2. Petitioner does not challenge that determination, and the outcome of his case would accordingly be unaffected regardless of how this Court disposes of Borden and Burris.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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